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f/k/a Shuffle Master, Inc.*

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LT GAME INTERNATIONAL LTD.,

Plaintiff,

vs.

SHUFFLE MASTER, INC.,

Defendant.

Case No.: 2:12-cv-01216-JAD-GWF

**REPLY IN SUPPORT OF OBJECTIONS
TO EVIDENCE OFFERED IN
SUPPORT OF PLAINTIFF LT GAME
INTERNATIONAL LTD.'S
OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT**

Contrary to Plaintiff LT Game International Ltd.'s ("LT Game International") belief, a party cannot avoid summary judgment through self-serving, contradictory hearsay evidence. Defendant SHFL entertainment, Inc. f/k/a Shuffle Master, Inc.'s ("SHFL") evidentiary objections set forth in its Objections to Evidence Offered in support of Plaintiff LT Game International Ltd.'s Opposition to Motion for Summary Judgment (Dkt. #102) (the "Objection") are clear, unambiguous, and supported by well-settled law. LT Game International has not raised any issues in its Response (Dkt. #108) to overcome the propriety of SHFL's Objection, nor can it.

To begin, SHFL did not "leav[e] Plaintiff and the Court to figure out what is being objected to and why," as LT Game International claims. SHFL made perfectly clear that it objected to, among other things, each and every instance where LT Game International improperly attempted to present double hearsay testimony "regarding purported conversations

1 between SHFL representatives and non-parties to this litigation." (Dkt. # 102, Obj. at 2:16-18.)
2 This includes the deposition testimony of Linyi "Frank" Feng and Jay Chun, as well as the sham
3 declaration that Feng presented in an effort to create the appearance of a genuine issue of material
4 fact. (*See id.*, 2:11-3:4, 3:16-18.) Because neither Feng nor Chun has personal knowledge and
5 competence to testify about these purported third-party conversations, the Court cannot consider
6 their hearsay-ridden testimony in any form for purposes of summary judgment. *Lucey v. City of*
7 *Reno*, 3:04-CV-00637-BES-PAL, 2008 WL 821585, at n.2 (D. Nev. Mar. 27, 2008) ("double
8 hearsay cannot be considered on a motion for summary judgment"); *Orr v. Bank of America*, 285
9 F.3d 764, 773-74 (9th Cir. 2002)); *see also* Fed. R. Evid. 801 (defining hearsay as "a statement
10 that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party
11 offers in evidence to prove the truth of the matter asserted in the statement"). Nor could it
12 consider this evidence at trial. Fed. R. Evid. 801.

13 In an effort to circumvent the law, LT Game International cites to the same cases that it
14 relied upon in its Opposition to Motion for Summary Judgment, which say that a party need not
15 present admissible evidence at the summary judgment stage so long as the evidence in question is
16 capable of being presented "in an admissible form at trial." *See Fraser v. Goodale*, 342 F.3d
17 1032, 1036 (9th Cir. 2003); *Fonseca v. Sysco Food Servs. of Ariz., Inc.* 374 F.3d 840, 846 (9th
18 Cir. 2004). LT Game International also relies upon a foreign, unreported case to support its claim
19 that the 2010 amendments to the Federal Rule of Civil Procedure created a "sea change in
20 summary judgment procedure," allowing inadmissible evidence to be considered on summary
21 judgment. (Dkt. #108, Resp. at 3:10-18.) It goes so far as to assert that since the 2010
22 amendments there is no precedent in the Ninth Circuit "for the proposition that hearsay cannot be
23 considered on a motion for summary judgment." (*Id.*, 6:4-9.)

24 In reality, however, federal district courts in the Ninth Circuit have said the exact opposite.
25 *See, e.g., Mitchell v. Zia Park, LLC*, 842 F. Supp. 2d 1316, 1321 (D. N.M. 2012) ("I conclude that
26 the 2010 amendments to Rule 56 effected no more than a *minor change* to this circuit's standard
27 for considering evidence on summary judgment.") (emphasis added). In fact, this Court as
28 recently as November 27, 2013, affirmed the long-standing rule that "[a] trial court can only

1 consider admissible evidence in ruling on a motion for summary judgment." *See Romero v.*
 2 *Nevada Dept. of Corrections*, CV-808-JAD-VCF, 2013 WL 6206705, *3 (D. Nev. Nov. 27, 2013)
 3 (citing *Orr*, 285 F.3d at 773-74). Other courts in the District of Nevada have ruled similarly even
 4 after the 2010 amendments to the rule. *E.g., Progressive Cas. Ins. Co. v. F.D.I.C.*, 2:12-CV-
 5 00665-KJD-PAL, 2012 WL 5418298, *1 (D. Nev. **Nov. 2, 2012**) ("Summary judgment motions
 6 can only be defeated by admissible evidence.") (citing *In re: Oracle Corporation Securities*
 7 *Litigation*, 627 F.3d 376, 385 (9th Cir. **2010**)); *Truseal Technologies, Inc. v. Beijing Huali*
 8 *Architecture Decoration Co., Ltd.*, 2:08-CV-1338 JCM-GWF, 2010 WL 3703792, *2 (D. Nev.
 9 **Sept. 10, 2010**) ("A trial court can only consider admissible evidence in ruling on a motion for
 10 summary judgment."); *Maidman v. Demeo*, 2:12-CV-00474-APG-NJK, 2014 WL 176641, *2 (D.
 11 Nev. **Jan. 13, 2014**) (same); *Farace v. Am. Airlines Inc.*, 2:10-CV-00724, 2012 WL 2367572, *4
 12 (D. Nev. **June 21, 2012**) (same); *Breakman v. Koehn*, 3:10-CV-0633-ECR-VPC, 2011 WL
 13 7279120, *1 (D. Nev. **Dec. 8, 2011**) ("Therefore, it is recommended that the defendant's motion
 14 for summary judgment be denied for failure to submit admissible evidence."), *report and*
 15 *recommendation adopted*, 3:10-CV-00633-ECR-VPC, 2012 WL 460284 (D. Nev. **Feb. 13, 2012**).

16 In any case, SHFL disposed of this false distinction in its Reply in Support of Motion for
 17 Summary Judgment. (Dkt. #104). That is to say, the hearsay-ridden evidence that LT Game
 18 International presented in hopes of avoiding summary judgment can **never** be presented "in an
 19 admissible form at trial" because Feng and Chun will **never** be competent to testify as to SHFL's
 20 alleged conversations with third parties. LT Game International's Objection ignores this fatal flaw
 21 in its argument.

22 But there is more. In situations such as this where a party claims that certain inadmissible
 23 evidence could be presented in an admissible form at trial, and therefore should be considered for
 24 purposes of summary judgment, the law requires that the party "explain how the evidence will be
 25 admissible when subjected to the rigors of trial." *Mitchell*, 842 F. Supp. 2d at 1321. As one court
 26 explained:

Thus, in response to an objection to summary judgment evidence, *the proponent of the evidence cannot merely assert that they will be able to produce evidence in an admissible form; rather, they must thoroughly explain the admissible form that they will introduce at trial.* Because of the significant impact of summary judgment, it is unfathomable that Rule 56 would allow a court to consider evidence that may not be admissible at trial.

Id. (emphasis added); *Sobel v. Hertz Corp.*, 291 F.R.D. 525, 533 (D. Nev. 2013) ("Once challenged, the proponent of the evidence may explain the admissible form that is anticipated.").

LT Game International falls woefully short in this regard. Instead of "thoroughly explain[ing] the admissible form that [it] will introduce at trial," as required, LT Game International simply suggests that certain third-party witnesses "may be available to testify at trial" and, in theory, could testify about these alleged conversations with SHFL. (See Dkt. #108, Resp. at 5:11.) Nonsense. Under LT Game International's interpretation of the law, summary judgment could never be granted because the nonmoving party would *always* claim that it is *possible* that it will secure and present evidence at trial even though it failed to do so during discovery. LT Game International is wrong on the law.

In the end, LT Game International has absolutely no admissible evidence to support the allegations in its pleadings. It cannot create the appearance of evidence, and therefore avoid summary judgment, by presenting its own hearsay-ridden testimony about what it believes some unknown employee of SHFL allegedly said to a third party. The law requires much more to avoid summary judgment. SHFL's Objection should be sustained.

DATED this 3rd day of February 2014.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 3 day of February 2014, I electronically filed the foregoing **REPLY IN SUPPORT OF OBJECTIONS TO EVIDENCE OFFERED IN SUPPORT OF PLAINTIFF LT GAME INTERNATIONAL LTD.'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** using the Court's CM/ECF system which will send notification to the following:

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